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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

Arizona Corporation Commission

DOCKETED

JUN 21 2005

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IN THE MATTER OF THE APPLICATION OF
DESERT LIVING ESTATES HOMEOWNERS
ASSOCIATION FOR ADJUDICATION NOT A
PUBLIC SERVICE CORPORATION.

DOCKET NO. W-04301A-05-0010

DECISION NO. 67946

OPINION AND ORDER

DATE OF HEARING:

April 18, 2005

PLACE OF HEARING:

Tucson, Arizona

ADMINISTRATIVE LAW JUDGE:

Jane L. Rodda

APPEARANCES:

RECEIVED

JUN 22 2005

AZ Corporation Commission
Director Of Utilities

Mr. Thomas B. Potter, President of
Desert Living Estates Homeowners'
Association; and

Ms. Diane Targovnik, Staff Attorney,
Legal Division, on behalf of the Utilities
Division of the Arizona Corporation
Commission.

BY THE COMMISSION:

* * * * *

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. On January 10, 2005, Desert Living Estates Homeowners Association ("Desert Living" "Association" or "Applicant") filed an Application for an adjudication that it is not a public service corporation under Arizona law.

2. On February 3, 2005, the Commission's Utility Division Staff ("Staff") docketed notification to Desert Living that its application met the sufficiency requirements of the Arizona Administrative Code.

3. By Procedural Order dated February 14, 2005, the matter was set for hearing at the

Commission's offices in Tucson, Arizona on April 18, 2005.

4. On March 10, 2005, Applicant filed certification that it had mailed notice of the hearing to the owners of the affected property.

5. On March 29, 2005, Staff filed its Staff Report in this matter, recommending that the Commission approve the application with conditions.

6. The hearing convened as scheduled on April 18, 2005, before a duly authorized Administrative Law Judge of the Commission. Dan White, Applicant's engineer, and Thomas B. Potter, President of the Association, testified on behalf of the Applicant. Reg Lopez testified for Commission Staff.

7. Desert Living is an Arizona nonprofit corporation that plans to provide potable water to a proposed subdivision consisting of 84 acres and 60 residential lots northwest of Tucson, east of Interstate 10 in Pinal County.

8. Desert Living is seeking a determination from the Commission that it is not a public service corporation under Arizona law. The legal description of the area to be served by Desert Living is attached hereto as Exhibit A, and incorporated herein by reference.

9. The current owners of the property to be served by Desert Living are the Susan E. Loosen Revocable Trust and Lotocka LLC, who will be the developers of the subdivision.

10. The sale of residential lots has not yet commenced. As a consequence, the current membership of the Association is represented by its Board of Directors.

11. In Commission Decision No. 55568 (May 7, 1987), the Commission issued a policy directive regarding applications for adjudication not a public service corporation, and provided the following criteria for evaluation of such applications:

(a) The application must be submitted by a non-profit homeowners association;

(b) The application must be a bona fide request by a majority of the membership of the association through a petition signed by 51 percent or more of the then-existing members;

(c) All associations making an application must have complete ownership of the system and necessary assets;

(d) Every customer must be an owner/member with equal voting rights and each

1 member is or will be a customer;

2 (e) The service area involved encompasses a fixed territory which is not within the
3 service area of a municipal utility or public service corporation, or if it is, the municipal utility or
4 public service corporation is unable to serve;

5 (f) There is a prohibition against further sub-division evidenced by deed restrictions,
6 zoning, water restrictions, or other enforceable governmental regulations; and

7 (g) The membership is restricted to a fixed number of customers, actual or potential.

8 12. Desert Living incorporated as a non-profit corporation on November 24, 2003.

9 13. Currently, the water system, which is expected to consist of a 200 gallon per minute
10 well and a 125,000 gallon storage tank with additional booster and pressure tanks, has yet to be
11 constructed.

12 14. The Board of Directors, comprised currently of the developer, has indicated that once
13 the water system is constructed it will be conveyed to the Association.

14 15. Given that the system has yet to be constructed, and thus has not been transferred to
15 the Applicant, Desert Living has not yet demonstrated actual compliance with the third criteria of
16 Decision No. 55568.

17 16. Staff recommends that the Applicant be required to demonstrate that an appropriate
18 water resource is available to service the expected demand of the proposed subdivision, and that the
19 Applicant should be required to file a copy of the appropriate Arizona Department of Water
20 Resources ("ADWR") Certificate of Assured Water Supply ("CAWS") by June 30, 2007.¹

21 17. In addition, Staff recommends that the Applicant be required to demonstrate that an
22 appropriate water system is constructed to serve the Association, and that the Association should be
23 required to file a copy of the Arizona Department of Environmental Quality's ("ADEQ") Approval of
24 Construction for the water system.

25 18. Staff also recommends that the Association should be required to demonstrate that the
26 water system has been conveyed to Desert Living by June 30, 2007.

27 ¹ In the Staff Report, Staff had originally recommended that compliance with its recommendations be completed by
28 December 31, 2006, but at the hearing, Staff agreed to allow the Association approximately two years to show
compliance with Staff's recommended conditions.

1 19. Desert Living provided a copy of its proposed Declaration of Covenants, Conditions
2 and Restrictions ("CC&Rs"), which will govern development of the Desert Living Estates
3 subdivision.

4 20. Because Desert Living Estates is a proposed development, without any current
5 members or customers and all votes are currently held and controlled by the developers, until such
6 time as the customers own all of the lots in the development, the developers would be able to use
7 ownership of the unsold lots as a majority vote in matters concerning the water system.

8 21. Article IV, Section 4.02 of the proposed CC&Rs states "each member shall have one
9 vote." However, the CC&Rs do not contain a provision that ensures members will have equal voting
10 rights with respect to the water system.

11 22. Staff believed that the lack of clarity concerning equal voting rights among the
12 customer/owners violates the 4th criteria set forth in Decision No. 55568.

13 23. Staff recommends that the Applicant be required to amend its proposed CC&Rs to
14 include a section that ensures equal voting rights.

15 24. Subsequent to the hearing, on May 18, 2005, Applicant filed revised CC&Rs as a late
16 filed exhibit. Pertinent to water system matters, the revised CC&Rs provide:

17
18 Notwithstanding anything contained in this Declaration, the Articles or the
19 Bylaws to the contrary, in the event of any vote with respect to any Water
20 System, voting in the association is equal among all members/lot owners. One vote shall be cast for each Lot owned. Each owner shall be entitled to
21 cast one vote for each Lot owned by such Owner. Notwithstanding the foregoing, Declarant shall not have the right to cast votes with respect to
22 Water System Matters pursuant to the Declaration.

23 25. The revised CC&Rs demonstrate that the developers will not have the right to cast votes
24 with respect to water system matters, however, the revised CC&Rs, which allow one vote per lot
25 owned, do not clearly provide equal voting rights for all members consistent with Commission
26 policy. For example, an owner could own multiple lots with only one residence or hook-up. As
27 drafted, the revised CC&Rs would give this member/owner greater voting power than a
28 member/owner who has one hook-up per lot.

1 26. Accordingly, we will require Desert Living to further amend, and file for Staff
2 approval, its revised proposed CC&Rs to provide proper definition of one vote per member to ensure
3 that lot owners/members have equal voting rights with respect to the water system, within 90 days of
4 the effective date of this Decision.

5 27. Desert Living's proposed CC&Rs preclude the Association from serving property
6 outside the Associations defined boundary

7 28. Desert Living is not within or adjacent to the service area of a municipality or public
8 service corporation.

9 29. The Association's CC&Rs prohibit further subdivision of the existing lots.

10 30. The CC&Rs are designed for 60 lots and prohibit expansion outside the development.

11 31. Desert Living is within the ADWR Tucson Active Management Area and will require
12 demonstration of a CAWS.

13 32. Staff believes that with Desert Living's compliance with Staff's recommendations
14 concerning ownership of the water system assets and revisions to its CC&Rs relating to voting rights,
15 the Association will comply with the Commission's criteria for being adjudicated not a public service
16 corporation.

17 33. Staff further recommends that the Commission's Decision granting the adjudication
18 not a public service corporation be considered null and void without further order of the Commission
19 should Desert Living fail to comply with Staff's recommended conditions by June 30, 2007. In the
20 event Desert Living does not comply with the conditions by June 30, 2007, Staff recommends that it
21 be required to file an application for a Certificate of Convenience and Necessity to provide water
22 service within 30 days.

23 CONCLUSIONS OF LAW

24 1. The Commission has jurisdiction over the subject matter of the Application.

25 2. Notice of the application was provided in accordance with law.

26 3. Staff's recommendations set forth in Findings of Fact Nos. 16, 17, 18, 23, and 33, and
27 the requirements of Findings of Fact No. 26 are reasonable and should be adopted.
28

1 4. Upon compliance with Staff's recommendations, Applicant would not be a public
2 service corporation within the meaning of Article XV of the Arizona Constitution.

3 5. Desert Living remains subject to applicable laws, regulations and order of other
4 regulatory agencies, including but not limited to ADEQ, ADWR and Pinal County.

5 **ORDER**

6 IT IS THEREFORE ORDERED that the application of Desert Living Estates Homeowners
7 Association for adjudication not a public service corporation is hereby granted conditioned upon its
8 compliance with the conditions set forth below.

9 IT IS FURTHER ORDERED that Desert Living Estates Homeowners Association shall file a
10 copy of the Arizona Department of Water Resources Certificate of Assured Water Supply by June 30
11 2007.

12 IT IS FURTHER ORDERED that Desert Living Estates Homeowners Association shall file a
13 copy of the Arizona Department of Environmental Quality's Approval of Construction for the water
14 system by June 30, 2007.

15 IT IS FURTHER ORDERED that Desert Living Estates Homeowners Association shall file
16 documentation that demonstrates it has been conveyed complete ownership of the water system by
17 June 30, 2007.

18 IT IS FURTHER ORDERED that within 90 days of the effective date of this Order Desert
19 Living Estates Homeowners Association shall amend, and file for Staff approval, its revised proposed
20 CC&Rs to provide that members have equal voting rights consistent with Findings of Fact No. 26
21 with respect to the water system.

22 IT IS FURTHER ORDERED that in the event Desert Living Estates Homeowners
23 Association fails to comply with the above conditions within the specified time, this Order
24 adjudicating Desert Living Estates Homeowners Association not a public service corporation shall be
25 null and void without further order of the Commission, and Desert Living Estates Homeowners
26 Association shall file an application for a Certificate of Convenience and Necessity by August 1,
27 2007.

28 IT IS FURTHER ORDERED that Desert Living Estates Homeowners Association shall file

1 with the Commission each June 30 until such time as the developer's ownership of lots constitutes
2 less than 33 percent, an annual certification signed by an officer, that the CC&Rs restricting further
3 subdivision of the current 60 parcels in the requested adjudication area, limiting the number of
4 memberships in the association, and granting equal voting rights, remain in place and have not been
5 altered, amended or repealed.

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IT IS FURTHER ORDERED that if the bylaws or CC&Rs of the Desert Living Estates Homeowners Association are ever changed to allow further subdivision of the current 60 parcels in the requested adjudication area, to allow an increased number of memberships. To allow expansion of the property to be served, or to change the equal voting requirements, that the adjudication granted herein shall immediately become null and void without further Commission Order, and Desert Living Estates Homeowners Association shall file an application for a Certificate of Convenience and Necessity within thirty days.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 21st day of June, 2005.

BRIAN C. McNEIL
EXECUTIVE SECRETARY

DISSENT _____

DISSENT _____

JR:mj

SERVICE LIST FOR:

DESERT LIVING ESTATES HOEMOWNERS
ASSOCIATION

DOCKET NO.:

W-04301A-05-0010

Thomas Potter
Desert Living Estates Homeowners Association
6700 N. Oracle Rd., Suite 414
Tucson, AZ 85714

S. Leonard Scheff
2720 E. Broadway Blvd.
Tucson, AZ 86716
Attorney for Applicant

Mr. Christopher Kempley, Chief Counsel
Legal Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

Mr. Ernest Johnson, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

EXHIBIT A

LEGAL DESCRIPTION

All that portion of the Southwest Quarter of Section 30, Township 10 South, Range 11 East, Gila and Salt River Baseline and Meridian, Pinal County, Arizona; more particularly described as follows:

Beginning at the Southwest Corner of said Section 30, thence N 00°07'57" W, along the West line of said Section 30, a distance of 1320.25 feet;

Thence leaving said West line of Section 30, S 89°58'32" E, a distance of 1447.67 feet;

Thence N 89°55'14" E, a distance of 1318.00 feet;

Thence S 00°05'03" E, a distance of 1321.48 feet to the South Quarter Corner of said Section 30;

Thence S 89°59'37" W, along the South line of said Section 30, a distance of 1319.03 feet;

Thence S 89°59'38" W, continuing along the South line of said Section 30, a distance of 1445.53 feet to the Point of Beginning.

The above described contains 3,650,824.86 square feet, OR 83.81 acres, more or less.